F. M. S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & TERRELL, J.A.

March 1, 1940.

LIM YEAN LEONG v. PUBLIC PROSECUTOR.

Criminal Procedure Code (Cap. 6), Section 163, 164, 165, 166 and 170—Joinder of Charges—Sentence on subsidiary charge.

The appellant was tried upon ten charges, being three main charges of criminal breach of trust all committed within a period of twelve months, the remaining charges being subsidiary to the main charges. He was convicted on the three main charges and one subsidiary charge, and acquitted on the remaining six subsidiary charges. He was sentenced on each of the four convictions, the sentences to run consecutively. The appellant averred that the multiplicity of the charges was illegal.

Held, the exceptions mentioned in section 163 of the Criminal Procedure Code are not mutually exclusive but are cumulative. For the purposes of that section charges subsidiary to the main charge may be tried with that charge, even though by so doing the total number of charges exceeds three.

The sentence on a subsidiary charge should be concurrent and not consecutive to the sentence on the main charge.

Cases referred to:—

(1) *Emperor v. Jiban Kristo Bagchi,* I.L.R. 40 Cal. 318.
(2) *Emperor v. Sheo Saran Lal,* I.L.R. 32 All. 219.
(3) *Emperor v. Tribhovandas Purshotamdas Mangrobwala,* I.L.R. 33 Bom. 77.
(4) *Kasi Viswanathan v. Emperor,* I.L.R. 30 Mad. 228.
(5) *Krishna Lal Mitra v. Emperor,* A.I.R. (1927) Cal. 946.
(6) *Lim Tain Chye v. P. P.,* 1 F.M.S.L.R. 228.
(7) *Mohamed Yakub, A.I.R.* (1932) All. 73.
(8) *Raman Behary Das v. Emperor,* A.I.R. (1915) Cal. 296.
(9) *R. v. Tan Thye Joo,* 2 M.L.J. 35; (1932) S.S.L.R. 214.
(10) *Sheik Hassan v. P. P.,* (Negri Sembilan Criminal Appeal No. 10 of 1939—unreported).
(11) *Subrahmania Ayyar v. Emperor,* I.L.R. 25 Mad. 61.
(12) *Tilak, In re,* I.L.R. 33 Bom. 221.

COURT OF APPEAL.

R. Ramani, for the appellant:

The appellant was charged on 10 different charges; this is illegal. Although convicted only on 4 charges, the illegality depends upon the accusation and not on the result—*see Mohamed Yakub*(1).

The matter rests upon the interpretation of sections 163, 164 and 165 of the Criminal Procedure Code, to which the following cases apply:

Subrahmania Ayyar v. Emperor(11).
Emperor v. Jiban Kristo Bagchi(1).
Kasi Viswanathan v. Emperor(4).
Raman Behary Das v. Emperor(8).
Krishna Lal Mitra v. Emperor(5).
Emperor v. Sheo Saran Lal(2).
Lim Tain Chye v. P. P.(6).

T. D. Wallace, Deputy Public Prosecutor, for the respondent:

There was no misjoinder as sections 163 and 164 are not mutually exclusive—*see Lim Tain Chye v. P. P.*(6).

The charges were preferred in this form so as to assist the appellant in the conduct of his defence.

Charges 1, 4 and 7 have only particularized the various amounts alleged to have been converted and could have been included in one charge [section 153 (ii) Criminal Procedure Code (Cap. 6)]. Charges 2, 3, 5, 6, 8 and 9 could have been included in one charge with particulars—*Sheikh Hassan v. Public Prosecutor*(10).

The object of the provisions is to avoid prejudice and that was the very object that was intended by particularizing the charges.

Ramani, in reply:

If there were no answer to one charge, it would prejudice the trial of the other charges. *Sheikh Hassan's* case is the converse of the present case: there accused was charged properly on a cumulative charge.

Section 153 (ii) relates only to criminal breach of trust, not to other subsidiary charges.

The Judgment of the Court of Appeal **(Poyser, C.J., McElwaine, C.J. S.S., & Terrell, J.A.)** was as follows:—

The appellant was tried on ten charges falling into three groups, two of three charges and one of four charges:—

A. Criminal breach of trust of $100.40 on 26th January, 1938, and two subsidiary charges of

falsification of two books of account on the same date.

B. Criminal breach of trust of $450 on 26th February, 1938, and two subsidiary charges of falsification of two books of account on the same date.

C. Criminal breach of trust of $807.83 on 19th April, 1938, and two subsidiary charges of falsification of two books of account and one of forgery on the same date.

He was convicted on each of the criminal breach of trust charges and on the forgery charge and was sentenced to six months R.I. on each of the four charges, the sentences to run consecutively. He was acquitted on the six falsification charges.

He appealed on fact and on law.

He alleges that the conviction was bad by reason of misjoinder of charges. If there was misjoinder, then however immeritorious the point is, the conviction must be quashed—*Subrahmania Ayyar v. Emperor*[11].

In each of the three groups the subsidiary offences were acts or omissions to implement or to conceal the criminal breach of trust.

Section 163 of the Criminal Procedure Code enacts that every distinct offence shall be tried separately except in the cases mentioned in sections 164, 165, 166 and 170.

Section 164 (i) enacts that when a person is accused of more offences than one of the same kind committed within the space of twelve months he may be charged with and tried at one trial for any number of them not exceeding three.

We pause to observe that under section 153 (ii) the criminal breaches of trust might have been lumped together and the accused might have been charged in one charge of having committed criminal breach of trust of $1,358.25 between 1st May, 1937, and 30th April, so the three specific charges are less embarrassing.

Section 165 (i) enacts that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

Section 166 provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once, or he may be charged, in the alternative, with having committed some one of the said offences.

It was conceded that all the offences in any one of the three groups could be separately charged and tried together under section 165, they being in the same transaction (*Sheikh Hassan v. P. P.*, Negri Sembilan Criminal Appeal No. 10 of 1939—unreported) but it was contended that the groups could not be charged together.

This contention amounts to this, that the exceptions mentioned in section 163 are mutually exclusive and not cumulative.

Indian decisions on the point are not uniform. On the one hand, we have such cases as *Emperor v. Jiban Kristo Bagchi*[1], on the other *Emperor v. Tribhovandas Purshottamdas Mangrole-Walla*[3] and *In re Tilak*[12].

In the former it was held that four charges, two under section 124A of the Penal Code and two under section 153A of the same Code could be tried together. In *Tilak* there were also two charges under each of these sections.

Before the trial commenced both the Crown advocate and the judge doubted whether the four charges could be tried together, so one was dropped and the accused was tried and convicted on two charges under section 124A and on one under section 153A.

He applied for leave to appeal to the Privy Council on the ground (among others) that these three charges were not of the same kind and could not legally be tried together. Scott, C.J., and Batchelor, J., held that the exceptions in the Indian section 233 (section 163 of the local Code) are not mutually exclusive, and, approving Tribhovandas' case, held not only that the three charges were properly joined but that the dropped charge might also have been lawfully joined with the other three.

These Bombay cases were followed by the Federated Malay States Court of Appeal in *Lim Tain Chye v. Public Prosecutor*[6] where nine charges were held to have been properly tried together, the Court holding that the sections now numbered 164 and 165 of the Code are not mutually exclusive and that sections 164 and 165 can be resorted to in framing additional charges where the trial is for three offences of the same kind committed within the year.

In the Colony Terrell, J., in *R. v. Tan Thye Joo*[9], held that the corresponding sections in the Colony Criminal Procedure Code are cumulative and not mutually exclusive.

We were referred to no contrary decision of any Court in the Straits Settlements or in the Federated Malay States where the law on the point is the same and following those cases, we hold that as the three criminal breaches of trust charges being offences of the same kind committed within a year could be tried together, and as the charges subsidiary to each criminal breach of trust charge could be tried with that charge, all ten charges can be tried together.

This occasions no injustice. The mischief at which the legislature aims in forbidding misjoinder is prejudice to the prisoner by confusion of issues and by introducing evidence of other offences tending to shew bad character. But this mischief does not arise where the evidence of other offences is introduced in order to prove—not that the accused is of bad character, but that he committed the offence with which he is charged.

The falsifications and forgery in group C were part of the evidence that the accused had committed criminal breach of trust of $807.83 on the 19th April, 1938.

We think too that each group is really one charge whether the offences are charged cumulatively or alternatively and that section 166 applies.

That being so we think that even had there been convictions on all ten charges there should not have been more than three cumulative sentences, in this case one for each criminal breach of trust which was the crime to which the others related.

The third criminal breach of trust might have been more heavily punished than the others if forgery was one of the means used to perpetrate it.

As regards the facts of the case, there was abundant evidence to establish the appellant's guilt on the three charges of criminal breach of trust. The trial judge, in his grounds of judgment, sets out very clearly such evidence, both oral and documentary, and there is no need for us to refer to it.

In view of what we have previously stated, the sentences on the 3rd and 4th charges will be concurrent and not consecutive. Subject to this variation of the sentence the appeal is dismissed.

Appeal dismissed. Sentence on subsidiary charge varied to run concurrently with sentence on main charge.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

February 13, 1940.

CHAN HO SIEW v. PUBLIC PROSECUTOR.

[RAUB CRIMINAL APPEAL]

Criminal Procedure Code, Ss. 302 (i) and 261—conviction—what constitutes—recording plea of guilty insufficient—continuation of proceedings before another Magistrate.

The appellant pleaded guilty to five separate charges under the Food Control Enactment (No. 21 of 1939). The Magistrate recorded "Plea accepted. Convicted. To 30th December, 1939, for sentence."

On the 30th December, 1939, the date fixed for sentence, the appellant was again charged with the same offences before another Magistrate. Evidence was taken and the accused was convicted and sentenced. The second Magistrate was not aware that the case had been before another Magistrate. On appeal.

Held, as regards second proceedings there had been no previous conviction. A conviction must include both an adjudication or finding of guilt and sentence.

Nevertheless the proceedings having been partly dealt with by one Magistrate, it was not competent for another Magistrate to deal with them except in a case clearly coming within the provisions of Section 261 of the Criminal Procedure Code. As the second Magistrate was not aware that the case had been before another Magistrate, the presumption of regularity could not be drawn. The second trial should not have been held and was a nullity.

MAGISTRATES CRIMINAL APPEAL.

E. Jeff for appellant.

There have been two convictions and the proceedings are contrary to section 261 and 302 of the Criminal Procedure Code. The Court should express its disapproval by refusing a re-trial. This is not a grave case and does not call for extreme penalties.

T. D. Wallace, Deputy Public Prosecutor, for the respondent.

The continuation of proceedings by another Magistrate is permissible under section 261 of the Criminal Procedure Code. The maxim "Omnia rite esse acta" applies. "Conviction" under section 302 of the Criminal Procedure Code means verdict plus sentence.

Horne, J.—The appellant was charged with five separate charges under the Food Control Enactment. He appeared at Temerloh before Che Saaidin Khadri, a first class Magistrate, on the 27th December, and admitted the offences. He stated he fully understood the consequences of his plea. The Magistrate then recorded: "Plea accepted. Convicted. To 30th December, 1939, for sentence."